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NO.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1986

Christopher THOMPSON
Plaintiff-Appellee-Petitioner

v.

SOUTHERN PACIFIC TRANSPORTATION CO., d/b/a
SOUTHERN PACIFIC RAILROAD CO., et al.
Defendants,

Monsanto Corporation,
Defendant-Appellant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals error in reversing the judgment of United States District Court by finding that there was insufficient evidence to establish causation between defendants exposure to dioxin at the industrial plant site and his subsequent development of porphyria.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioner: Christopher Thompson

Respondent: Monsanto Corporation

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES AND THE JUSTICES THEREOF:

Petitioner, Christopher Thompson, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this cause, specifically, its opinion of February 13, 1987.

OPINIONS BELOW

Opinion of the United States Court of Appeals for the Fifth Circuit, *Thompson v. Southern Pacific Transportation Co.*, is reported in Snopsis, Syllibi and Key Number Classification Copyright 1987 by West Publishing Co. at page 2301 and is reprinted as Appendix A hereof.

The original judgment of the United States Court for the Eastern District of Louisiana, and the Minute Entry of the Courts ruling on defendant's motion for a judgment notwithstanding verdict are unreported and are printed as appendix B hereof.

The judgment of the United States Court for the Eastern District of Louisiana in accordance with the opinion of the Court of Appeals is unreported and is printed as Appendix B. hereof.

JURISDICTION

This Petition for Writ comes as the result of the opinion and judgment of the United States Court of Appeals for the Fifth Circuit dated February 13, 1987.

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code, Sections 1254.

Article 3, section 2 of the United States Constitution, provides:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made or which shall be made under their authority;...to

> controversies ... between citizens of different States...

STATUTES INVOLVED

Louisiana Civil Code Article 2315 providing:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective catagories of persons who would have had a cause of action for wrongful death of an injured person.

Louisiana Civil Code Article 2317 providing:

> We are responsible not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of things we have in our custody. This, however, is to be understood with the following modifications.

STATEMENT OF THE CASE

Christopher Thompson (Petitioner) filed his Complaint in this case on April 17, 1981, alleging that during the course of his employment with Southern Pacific Railroad, he frequently entered the Monsanto plant at Luling, Louisiana, where he was caused to suffer a severe and permanently disabling occupational disease called porphyria cutanea tarda.

Mr. Thompson alleged that Monsanto (Respondent) was negligent in:

a.) Manufacturing, processing or storing a defective and believed to be hazardous product called hexachlorobenzene and/or other chemicals and,

b.) Failure to warn of the hazard of exposure to hexachlorobenzene and/or other chemicals.

Mr. Thompson further alleged that Monsanto is liable to him under Article 2317 of the La. Civil Code as a result ofits having custody over certain allegedly hazardous chemicals, including hexachlorobenzene.

A trial date was originally scheduled for August 30, 1982, in the United States District Court for the Eastern District of Louisiana. After several delays and continuances, Trial began on Thursday, October 28, 1985. The jury heard two days of testimony and the court then continued the trial, leaving a sitting jury, until resumption of the trial on October 28, 1985. After trial, the jury rendered in favor of Mr. Thompson in the amount of $200,000.00, which verdict was made the judgment of the Court on November 5, 1985. The court denied Monsanto's motions for post-trial relief on December 5, 1985, and Monsanto appealed to the U.S. Fifth Circuit Court of Appeals.

The United States Court of Appeals for the Fifth Circuit reversed the judgment of the trial court in an opinion on February 13, 1987. It is from this reversal that petitioner seeks redress in this Honorable Court.

FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The parties to this action are citizens of different states of the United States and the amount in controversy is over $10,00.00 The United States District Court for the Eastern District of Louisiana had jurisdiction in this matter pursuant to 28 U.S.C 1332.

ARGUMENT FOR GRANTING CERTIORARI

THE OPINION OF WHICH PETITIONER SEEKS REVIEW, BY NOT GRANTING SUFFICIENT DEFERENCE TO THE TRIER OF FACT, INCORRECTLY APPLIES THE STANDARD OF REVIEW BY APPELLATE COURTS OVER THE MATTER OF SUFFICIENCY OF EVIDENCE IN DIVERSITY CASES.

It is well settled in the federal jurisprudence that the trier of fact is to be granted much deferences as to matters of fact, which matters include the sufficiency of evidence.

In *Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606, (1982) it was held:

> Determining the weight and credibility of the evidence is the special provence of the trier of fact.

The Fifth Circuit, stating that it was "deferring fully to the jury's prerogatives" found that petitioner

> did not introduce sufficient evidence at trial to establish a link of causation between his alleged

exposure to dioxin at Luling and the development of his porphyria.

Petitioner disagrees with this assessment of the evidence introduced at the trial. The jury found that plaintiff's verdict should not have been overturned by the evidence. Their verdict should not have been overturned without much greater proof that it was erroneous than is present in this case. The trial judge correctly found that the verdict was properly suported by the evidence.

Thus having convinced the jury and the trial judge that his evidence was sufficient, the plaintiff was presented the added burden of having to prove his case yet again, to the Fifth Circuit. In *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985) this Honorable Court held:

> ...the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them persuade three more judges at the appellate level is too much. As the Court has stated in a different context, the trial on the merits should be "the main event"... rather than a "tryout on the road" *Wainwright v. Sykes, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977)*

In its opinion, the 5th Circuit quoted Boeing v. Shipman, 411 F.2d 365, 368 (5th Cir. 1969) in holding that a judgment notwithstanding verdict should be granted when:

> the facts and inferences point so strongly and overwhelmingly in favor of one party that the

court believes that reasonable men could not arrive at a contrary verdict.

In the instant case, reasonable men could and indeed did arrive at a verdict contrary to the decision of the Fifth Circuit. Furthermore, not only were these reasonable men, they were men chosen for their impartiality by the time tested and honored jury selection process. These reasonable men, these *jury*men, after having heard and seen the witnesses and the evidence offered by both sides first hand decided that plaintiff had offered sufficient evidence to support his allegations. The trial judge, also having heard and seen the witness and evidence first hand, ruled that there was indeed enough evidence to support the jury's verdict. As opposed to this "front line" observation of the evidence we have what Justice Tate, in his eloquent dissenting opinion on the admittedly different issues of appellate review of excessive awards[1] called "appellate judges secluded in their appellate chambers from the ongoing realities of everyday life."

The degree of seclusionn afforded appellate judges is, of course, necessary and desirable, but places them in a position better to judge law than facts. The primary finder of facts remains the judges and Juries of the trial courts.

In this case, there was sufficient evidence to sustain the verdict of the jury and the judgment of the trial court and it was error for the Court of Appeals for the Fifth Circuit of Louisiana to reverse that judgment. Certiorari should be granted, the decision of the Fifth Circuit Court of Appeals should be overturned and the decision of the trial court should be reinstated.

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[1] *In re Air Crash Disaster Near New Orleans*, 767 F.2d 1151 (5th Cir., 1985)

In the alternative, in the interest of justice and fairness, this case should be remanded to the trial court, to afford plaintiff the opportunity to reassert his claim.

CONCLUSION

In this case, there was sufficient evidence to support the jury's verdict for plaintiff and the trial judge was correct in denying defendant's motion for a motion notwithstanding verdict. Therefore, it was error for the united States Fifth Circuit Court of Appeals to reverse the judgment of the trial court.

CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of this Honorable Court, herby certify that three copies of the Petition herein have been served upon respondent's counsel, Brian C. Misshore, Esq. by delivering the same to his offices at 21st floor Pan American Life Center, 601 Poydras Street, New Orleans, Louisiana 70130-6097, this 12th day of May, 1987.

_____

DANIEL E. BECNEL, JR.

APPENDIX A

Christopher THOMPSON
Plaintiff-Appellee,

v.

SOUTHERN PACIFIC TRANSPORTATION CO., d/b/a SOUTHERN PACIFIC RAILROAD CO., et al.
Defendants,

Monsanto Corporation,
Defendant-Appellant.

No. 86-3018
Fifth Circuit.

FEB 13 1987

Railroad worker brought action against owner of industrial plant site, alleging that porphyria was caused by exposure to dioxin at the site. The United States District Court for the Eastern District of Louisiana, Robert F. Collins, J., entered judgment in favor of worker, and owner appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that evidence was insufficient to establish link of causation between worker's alleged exposure to dioxin and development of worker's prophyria.

Reversed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A railroad brakeman worked at various times during a three-year period aboard a train that entered an industrial plant site contaminated by dioxin. After he had been fired by the railroad for being intoxicated on the job, he sued the owner of the contaminated area contending that a disease from which he was suffering, porphyria, had been caused by his exposure to dioxin. The jury returned a verdict in his favor, but, finding that the worker had failed to offer any substantial evidence to support the thesis that his disease was caused by his exposurer, we reverse the judgment in his favor and enter judgment for the plant owner.

I.

Christopher Thompson's work as a breakman for the Southern Pacific Railroad often brought him to Monsanto's Luling, Louisiana plant which was served by the railroad. After he had been employed for three years, he was fired in 1981 for being intoxicated on duty. Soon thereafter, Thompson sued Southern Pacific and Monsanto, alleging that his occupational exposure to hexachlorobenzene or other chemicals at the Luling plant had caused his severe and disabling case of porphyria cutanea tarda. Porphyria cutanea tarda is an illness characterized by chronic skin lesions and abnormal liver function; it may be caused by administration of estrogens, consumption of alcohol, or exposure to certain chemicals. Thompson based his claim against Southern Pacific on the Federal

Employers' Liability Act and his claim against Monsanto on Louisiana negligence law.

While discovery was being conducted, Monsanto publicly announced that dioxin had contaminate a small area of the Luling plant site near the Southern Pacific railroad tracks. Monsanto linked the contamination to periods in 1965 and 1967 when the chemical 2,4,5—T, a precursor of dioxin, was loaded and unloaded at the plant. Meanwhile, discovery showed that no hexachlorobenzene had been found at the Luling facility. Thompson then contended that dioxin caused his porphyria.

On the eve of trial, Thompson settled his claim against Southern Pacific for $5,000. After hearing the evidence, the jury rendered a $200,000 verdict against Monsanto. Monsanto moved for a new trial, judgment notwithstanding the verdict, and a remittitur, but the district court judge denied all three motions. Monsanto appeals on the grounds that the verdict was not supported by sufficient evidence and that Thompson's counsel engaged in improper behavior during trial.

II.

Most federal courts apply a federal standard when evaluating the sufficiency of evidence in diversity cases.[1] A judgment notwithstanding the verdict should be granted when "the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary

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[1] *Boeing Co. v. Shipman*, 411 F.2d 365, 368 (5th Cir. 1969)(en banc): SA J. Moore & J. Lucas, Moore's Federal Practice ¶50.06 (2d ed. 1986).

verdict."[2] A mere scintilla of evidence will not create a jury question; instead, "[t]here must be a conflict in substantial evidence."[3] Deferring fully to the jury's prerogatives in weighing conflicting evidence and in determining the credibility of witness,[4] we find a lack of substantial evidence to support the verdict, for Thompson did not introduce sufficient evidence at trial to establish a link of causation between his alleged exposure to dioxin at Luling and the development of his porphyria.

Thompson called several expert witnesses to support his theory of causation. One, a chemical engineer, described the chemical composition of dioxin and the methods of sampling soil that might be contaminated with dioxin. He further testified that dioxin in contaminating the soil can be ingested, inhaled, or absorbed into the body of an individual working nearby. The engineer did not testify, however, about Thompson's degree of exposure to dioxin; he did not know where Thompson worked at Luling or the amount of time Thompson spent at the plant site. In short, his testimony simply indicated that someone working around dioxin-contaminated soil might develop porphyria and described how that possibility could be established without specifically addressing Thompson's exposure. A good deal of his testimony, in fact, focused on reports of dioxin exposure at locations other than Luling. A second expert, a toxicologist, did testify that dioxin caused Thompson's porphyria. He based his opinion on the fact that Thompson worked at a site where dioxin was found

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[2] *Id.* at 374; *Eyre v. McDonough Power Equipment, Inc.*, 755 F.2d 416, 419 (5th Cir. 1985).

[3] *Boeing*, 411 F.2d at 374-75.

[4] *Id.* at 375.

and therefore "definitely could have come into contact with it." He did not, however, have any knowledge about the amount or duration of Thompson's exposure. There was, then, an insufficient factual basis for his opinion.[5] On the other hand, Monsanto's toxicology expert testified that, in view of the dioxin measurements made at the site, Thompson would have received an exposure to dioxin less than 2% of the recommended maximum amount for residential areas, an exposure insufficient to cause porphyria. He further testified that Thompson's symptoms were not consistent with dioxin-induced prophyria: in all previous cases of porphyria associated with dioxin exposure, chloracne has accompanied the porphyria, and Thompson has never suffered from chloracne.

The testimony by the physicians called as experts also failed to substantiate the ultimate issue of causation—that dioxin caused Thompson's porphyria. A neurolgist, introduced by Thompson, stated that dioxin exposure *could* cause the kinds of symptoms that Thompson experienced, but did not offer an opinion as to what in fact had caused Thompson to suffer from the disease. While he did not believe it was caused by alcohol, he testified that he had insufficient information about the concentration of dioxin at Luling or the amount of time Thompson worked there to decide whether exposure to dioxin caused the porphyria.

Five other physicians testified, all of whom had treated Thompson for his porphyria, and none believed that dioxin had caused it. One of the doctors was qualified as an expert in the field of internal medicine with specialized training and work in the specific areas of liver diseases

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[5] *Chlhoun v. Honda Motor Co.*, 738 F.2d 126, 131-32 (6th Cir. 1984).

and porphyria. He testified that, in his opinion, Thompson's illness was related to his consumption of alcohol and he too thought that Thompson's failure to develop chloracne excluded dioxin as the cause of the porphyria. Two of the other physicians, both specialists in internal medicine, attributed the illness to Thompson's alcohol consumption. The remaining two physicians either were not asked to give an opinion or had no opinion regarding causation.

Having found insufficient evidence to support the verdict, we need not reach Monsanto's claim of improper behavior by plaintiff's counsel.

For these reasons, wer REVERSE and enter judgment for the defendant.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Nov. 6 1985

CHRISTOPHER THOMPAON	CIVIL ACTION
VERSUS	NO. 81-1512
MONSANTO CORPORATION	SECTION "C'(3)

* * * * * * * * * * * * * *

J U D G M E N T

The jury having duly rendered its verdict, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiff, Christopher Thompson, and against defendant, Monsanto Corporation, in the amount of $200,000.00 plus interest at the legal rate from the date of judicial demand and costs.

New Orleans, Louisiana, this 5th day of November, 1985.

LORETTA G. WHYTE, CLERK

By: /s/ illegible
CHIEF DEPUTY CLERK

Approved as to form:

/s/ Robert F. Collins
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY: Nov 6, 1985

MINUTE ENTRY
December 4, 1985
COLLINS, J.

Filed
Dec 5 1985

CHRISTOPHER THOMPSON CIVIL ACTION

VERSUS NO. 81-1512

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, ET AL. SECTION "C"

* * * * * * * * * * * * * * * * * *

Monsanto Company has moved the Court for a judgment notwithstanding the verdict of the jury on the ground that the evidence presented at trial as to the causal link between Christopher Thompson's alleged exposure to dioxin and his alleged illness was not sufficient to create an issue upon which reasonable men could differ. Monsanto has also moved for a new trial and alternatively for remittitur on the grounds that the verdic t was against the weight of the evidence, the arguments and questions of counsel have prejudiced defendant's right to a fair trial, the verdict is unfair and amounts to a miscarriage of justice, the instructions to the jury were inadequate and misleading, and that the verdict was excessive. The Court has considered ıll the motions, has reviewed the evidence and has read the mnemoranda submitted by counsel. The Court concludes that the Judgment is proper, fully sup

Date of Entry: DEC 05 1985

ported by the evidence, and should stand. Accoridngly, the Court hereby DENIES the Motion for New Trial, for a Judgment Notwithstanding the Verdict, and for Remittitur.

A brief review of the evidence demonstrates that the Judgment was supported by evidence submitted at trial.

Clayton D. Callihan, Ph.D., an expert in chemical engineering and professor emeritus from the Louisiana State University School of Chemical Engineering, testified concerning chemical engineering principles, the composition of dioxin, methods for sampling soil that was contaminated with dioxin and methods of how an individual working in a plant where dioxin was found to exist might come into contact with dioxin, Dr. Callihan stated that the plaintiff could have come in contact with dioxin from breathing it, ingestion of dust particles or physical contact in the area where Christopher Thompson worked at Monsanto's chemical plant in Luling, Louisiana.

Joshua Carey, M.D., an expert in neurology, was of the opinion that the porphyria and convulsive disorder suffered by the plaintiff was compatible to an exposure to a toxin such as dioxin. Dioxin was found to exist at the Monsanto plant site from spillages which occured between November, 1965 and January, 1966 and May, 1967 to October, 1967.

Mrs. Thompson testified that the changes to her husband following his liver disease have been so great that it caused them to separate and that despite their best efforts they have not been able to have children. The plaintiff cannot work in the sunlight or in the cold due to the sensitivity of his skin.

Plaintiff testified that he would no longer be able to pass a company physical for certain types of employment. Also, it is undisputed that the plaintiff suffered from a rare liver disorder, PCT.

The jury instructions were not misleading or confusing simply because the jury wrote and asked certain questions. Considering the complexity of this case and the length of time it took to try the case, it is not unusual for the jury to have asked for clarification on certain issues. Nor is it unusual for juries to inquire as to what the term "proximate" means.

Based on the above evidence, review of the record, and other evidence introduced at trial, the Court finds that the verdict and the judgment are proper and fully supported by the record.

WHEREFORE, the Motion for New Trial, for a Judgment Notwithstanding the Verdict, and for Remittitur are hereby DENIED.

/s/ Robert F. Collins

UNITED STATES DISTRICT JUDGE

UNITED STATERS DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed:
Mar 12, 1987

CHRISTOPHER THOMPSON CIVIL ACTION

VERSUS NO. 81-1512

SOUTHERN PACIFIC TRANSPORTATION CO.
d/d/a SOUTHERN PACIFIC RAILROAD CO.,
ET AL SECTION "C"(3)

* * * * * * * * * * * * * *

J U D G M E N T

In accordance with the opinion of the United States court of Appeals issued as mandate on March 9, 1987;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendant, Monsanto Corporation, and against plaintiff, Christopher Thompson, dismissing the complaint with prejudice, at plaintiff's cost.

New Orleans, Louisiana, this 12th day of March, 1987.

/s/ Robert F. Collins
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY: MAR 12 1987